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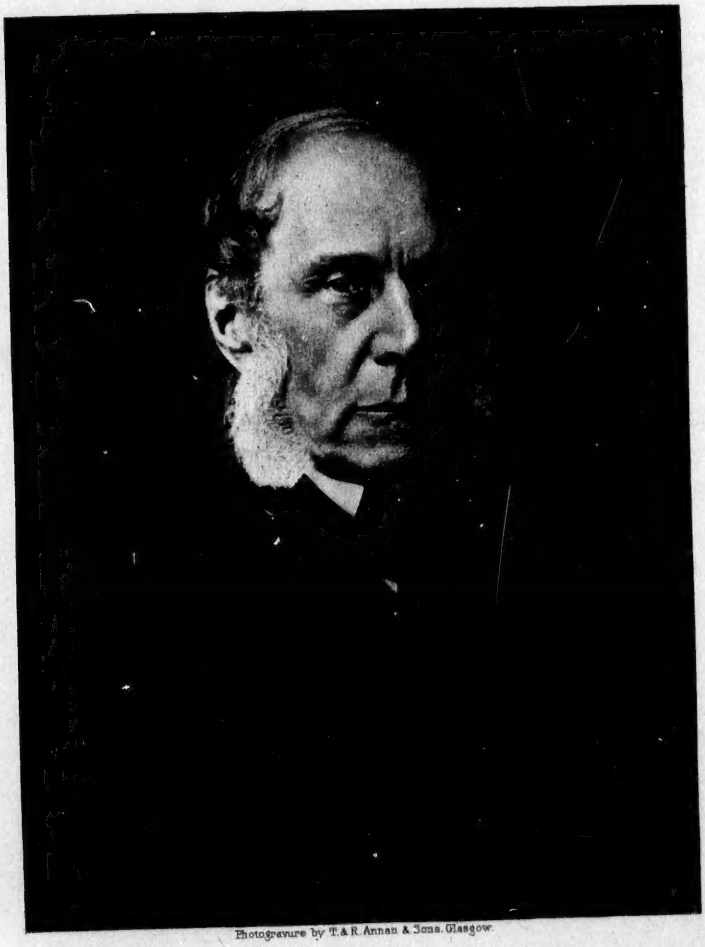

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The Right Hon. The Earl of Selborne.

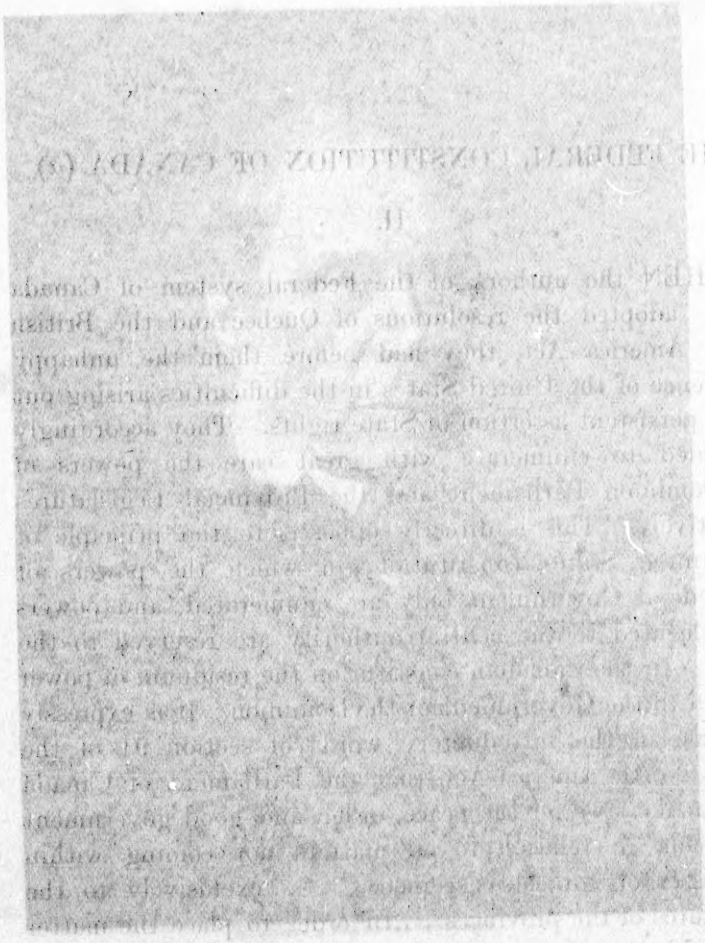
EX LORD HIGH CHANCELLOR OF GREAT BRITAIN.

THE FEDERAL CONSTITUTION OF CANADA (o)

II

WHEN the framers of the Federal system of Canada adopted the resolutions of Quebec and the British North America Act, they had before them the unhappy experience of the United States in the difficulties arising out of the peculiar assertion of State rights. They accordingly proceeded to enumerate with great care the powers of the Dominion Parliament and the Provincial Legislatures respectively. This is directly opposed to the principle of the United States constitution, in which the powers of the Federal Government only are enumerated, and powers not delegated to the central authority are reserved to the States. In the Canadian constitution the residuum of power is given to the Government of the Dominion. It is expressly set forth in the introductory words of section 91 of the British North America Act, that the Parliament of Canada is "to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned . . . . . exclusively to the legislatures of the provinces." In order to place the matter beyond doubt, the same section not only states that the enumeration of Dominion powers is not to restrict the generality of the words just quoted, but it concludes with the declaration that "any matter coming within the classes of subjects enumerated in this section shall not be deemed

(o) The first part of this article will be found, *supra*, p. 131.



THE FEDERAL CONSTITUTION OF CANADA. (a)

II.

WHEN the authors of the Federal system of Canada adopted the resolutions of Quebec and the British North America Act, they had before them the unhappy experience of the United States in the difficulties arising out of the persistent assertion of State rights. They accordingly proceeded to enumerate with great care the powers of the Dominion Parliament and the Provincial Legislatures respectively. This is directly opposed to the principle of the United States constitution, in which the powers of the Federal Government only are enumerated, and powers not delegated to the central authority are reserved to the States. In the Canadian constitution the residuum of power is given to the Government of the Dominion. It is expressly set forth in the introductory words of section 91 of the British North America Act, that the Parliament of Canada is "to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned . . . exclusively to the legislatures of the provinces." In order to place the matter beyond doubt, the same section not only states that the enumeration of Dominion powers is not to restrict the generality of the words just quoted, but it concludes with the declaration that "any matter coming within the classes of subjects enumerated in this section shall not be deemed

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to come within the classes of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively by this act to the legislatures of the provinces.

Although only twenty-three years have passed since the establishment of the Federal union, the time of the Courts of Canada and of the judicial committee of the Privy Council has been much occupied by the consideration of cases which have arisen upon the interpretation of section 91, and of section 92, which contain the enumeration of dominion and provincial powers. A careful examination of these two sections will show the student that, despite the obvious intention to give predominance to the Dominion Parliament in cases not expressly provided for, there are in the very terms of the enumeration itself the elements of grave doubt and controversy. Questions of difficulty have constantly arisen in connection with "property and civil rights in the province," over which exclusive authority has been given by section 92, sub-section 13, to the provincial legislatures. It necessarily happens that in legislating on subjects within its exclusive jurisdiction the Dominion Parliament may trench upon the provincial rights in this particular. Again, with regard to certain classes of subjects generally described in section 91, as belonging to the Dominion, legislative power may nevertheless reside as to some matters, falling within the general description, in the provincial legislature. Or, subjects which in one aspect, and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91. Or, the powers of the Dominion and provincial authorities are in certain cases expressed in such broad and general terms as to cover and include the same subject. For instance, insurance has been judicially determined to fall within the express power of the Dominion Parliament to regulate trade and commerce, and also within the more specific power of the provincial legislatures over "the incorporation of companies with provincial objects." Consequently the Dominion Parliament has passed a great number

of Acts, incorporating insurance companies to do business throughout the Dominion. The provincial legislatures also incorporate similar companies to transact business within the limits of a province. At the same time it is authoritatively laid down that the Dominion Parliament has no power to regulate by legislation the contracts of a particular business or trade in a province, but the form of the contract, and the rights of the parties thereunder, must depend upon the laws of the country or province in which the business is done —the power being given to the local legislatures to legislate upon "property and civil rights in the province." (*a*)

In the case of the inland fisheries, difficulties have also arisen. Here the conflict lies between the powers of the Provinces over "property and civil rights," and those given to the Dominion over "sea-coast and inland fisheries." It has been decided by the Supreme Court of Canada that the Dominion Parliament may exercise a general power for the protection and regulation of the fisheries, and may authorise the granting of licenses, where the property, and therefore the right of fishing thereupon, belongs to the Dominion, or where such rights do not already exist by law; but it may not interfere with existing exclusive rights of fishing, whether provincial or private. Therefore, any lease granted by the Dominion Government to fish in fresh water non-tidal waters, which are not the property of the Dominion, or of which the soil is not the property of the Dominion, is illegal. In the same way, where the exclusive right to fish has been acquired as incident to a grant of land, through which a non-tidal river flows, the Canadian Parliament has no power to grant a right to fish therein. So also, the ungranted lands in a province being in the Crown for the benefit of the people, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license of the Minister of Marine and Fisheries

(*a*) *The Citizens and the Queen's Insurance Companies* v. *Parsons*, 45 L.T., N.S. 721; Can. Sup. Courts R., vol. iv. p. 277; 4 Ontario App. 109; Bourinot's "Manual," pp. 123-128.

would be illegal.(*a*) Here we see the effort of the Courts to interpret the constitution so as to reconcile the respective powers of the Dominion and the Provinces where they appear to clash, and to make the exercise of the rights of the former consistent as far as possible with those of the other.

With the view of reconciling the difficulties that are constantly arising with respect to property and civil rights, the following principles have been laid down by the Canadian Courts:

That as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must to a certain extent be subject to the general and special legislative powers of the Dominion. But while the legislative rights of the local legislatures are, in this sense, subordinate to the rights of the Dominion Parliament, these latter rights must be exercised as far as may be, consistently with the rights of the local legislatures, and therefore the Dominion Parliament has only the right to interfere with property and civil rights, in so far as such interference may be necessary for the purpose of legislating generally and effectively in relation to matters confided to the Parliament of Canada.(*b*)

But it is reasonable to assume that the right of the Federal Parliament to legislate in this manner is limited to such legislation as is absolutely necessary to give full effect to its lawful powers. It cannot be argued from the most strained interpretation of the constitution, that the Federal legislature should, in the exercise, for instance, of its general power to provide for the peace, order, and good government of Canada, obliterate the jurisdiction of the local legislatures over matters of a purely provincial or municipal character, or assume full control over civil rights and property.(*c*)

On the other hand, the local legislatures, whose powers

(*a*) *The Queen* v. *Robertson*, Canada Supreme Court R., vol. vi. pp. 52-143.
(*b*) Can. Sup. Court R., vol. iii. p. 15; vol. iv. pp. 110 and 111, 242.
(*c*) Can. Sup. Court R., vol. iv. 272.

are limited compared with those of the General Parliament, must be careful to confine the exercise of these to the particular subjects expressly placed under their jurisdiction, and not to encroach upon subjects which, being of national importance, are for that very reason placed under the exclusive control of Parliament.(*a*)

Where a power is specially granted to one legislature, that power will not be nullified by the fact that indirectly it affects a special power granted to the other legislature. In other words, it is only in the case of absolute incompatibility that the special power granted to the local legislature gives way.(*b*)

The wide construction placed on the general power given to the Dominion Parliament "to make laws for the peace, order, and good government of Canada," can be seen from a decision of the Judicial Committee of the Privy Council with respect to the Canada Temperance Act, which is a law of "local option," giving the ratepayers in any locality the power to prohibit the sale of intoxicating liquors, and to regulate the traffic in liquor generally. Their Lordships laid it down emphatically (an issue having been taken as to the power of the Dominion Parliament to pass the measure), that "laws designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights." They are of a nature which "fall within the general authority of Parliament to make laws for the order and good government of Canada, and have a direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada." Few, if any, laws "could be made by the Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have

(*a*) Can. Sup. Court R., vol. iv. 348.
(*b*) Meredith, C. J., 5 *Legal News*, Montreal, 333.

been intended, when assuring to the Provinces exclusive legislative authority on the subject of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it." On these grounds the Judicial Committee decided in favour of the constitutional character and validity of the Scott Act.(*a*)

In the first ten years of the Confederation there was a tendency in the Courts, as well as in Parliament, to minimise the jurisdiction of the provincial legislatures, and to claim that they were only practically municipal corporations of large powers. It was even claimed that the Crown is not represented in the provincial governments. In one memorable case it was practically decided by a mere majority of the Supreme Court of Canada that the Dominion Government alone has the right to appoint Queen's Counsel as a prerogative right of the Queen, who is represented directly by the Governor-General. (*b*) With the progress of Confederation, however, there has been a steady assertion of provincial rights; a determination, in fact, on the part of the provincial governments to stretch to an extreme degree both the express and the implied powers of the provinces, and the general result of recent decisions has been to strengthen the claims of the advocates of "provincial rights." It is now generally admitted, or more strictly speaking, the weight of authority goes to show, that the Crown is represented in the person of the Lieutenant-Governor as the head of the provincial executive, so far as concerns the performance of

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(*a*) 7 App. Cas. 829.

(*b*) *Lenoir* v. *Ritchie*, Can. Supreme Court Rep., vol. iii. pp. 575-640 The opinions expressed in this case by three judges with respect to Queen's Counsel have never been considered satisfactory by eminent lawyers in Canada and England, who have looked into these legal questions. The provincial governments continue to appoint such counsel concurrently with the Dominion Government, by virtue of provincial statutes; and the consequence so far has been a multitude of counsel, and a lessening of the estimation in which the honour should be held. General opinion favours a test case before the Judicial Committee of the Privy Council.

all executive or legislative acts that have to be performed by such functionaries in the Queen's name—the assembling and dissolution of the legislature, and other executive acts.(*a*) But the decision which has given greatest force to the assertion of provincial rights is one pronounced by the Judicial Committee of the Privy Council on a License Act of Ontario, which was decided to be within the powers of the provincial legislatures. The ground of the decision was that the powers conferred by the act in question are in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., and such as are calculated to preserve in a municipality peace and public decency, and repress drunkenness and riotous conduct. The Judicial Committee laid it down emphatically, that the provincial legislatures are "in no sense delegates of, or acting under any mandate from the Imperial Parliament." They go on then to say, that when the British North America Act provided that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the provinces and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area, "the local legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of Canada." (*b*)

Three large octavo volumes(*c*) are now required to contain the various decisions given on the cases in which constitu-

(*a*) Todd's "Parliamentary Government in the Colonies," pp. 392, 393; Can. Sup. Court R., vol. v. pp. 637-643. See also *Theberge* v. *Landry*, 2 App. Cas. 102, which appears to sustain the provincial contention that the Crown is a constituent part of the provincial legislature.—*Canada Law Journal*, Jan., 1890.

(*b*) *Hodge* v. *Reginam*, 9 App. Cas. 117.

(*c*) See Cartwright's "Cases on B.N.A. Act," 3 vols., Toronto. Another volume is promised this year.

tional difficulties have arisen. All the Courts of the provinces have the right to interpret the constitution, and declare an act of any legislative authority in the Dominion *intra* or *ultra vires* as the case may be. They do this in the ordinary process of law, and not under any special power given them by the constitution. The Supreme Court of Canada, however, was established for the purpose of acting as far as possible as a Court of Appeal for the provinces. It is not, however, the ultimate Court of Appeal for the Dominion, since it is the continual practice of the Judicial Committee of the Privy Council to entertain appeals from the Supreme Court, when it is considered any error of law has been made and substantial interests are involved. Indeed, the Court can be considered only a general Court of Appeal for the Dominion itself in a limited sense, since there is in every province the right to appeal from its Appellate Court directly to the Privy Council.(*a*) But the general sense of the people is tending more and more to make the Supreme Court, as far as practicable, the ultimate Court of Appeal in all cases involving constitutional issues. It is felt that men, versed in the constitutional law of Canada and of the United States, and acquainted with the history and the methods of government, as well as with the political conditions of the country at large, are more likely to meet satisfactorily the difficulties of the cases as they arise, than European judges who are trained to move in the narrower paths of ordinary statutes. A remarkable assertion of the judicial independence of Canada can be seen in the Act (*b*) passed by the Parliament of the Dominion

(*a*) Cassell's "Practice of the Supreme Court of Canada," p. 4. *Supra*, p. 137, the copyist gives the number of Supreme Court judges incorrectly; the Court consists of a chief justice and five puisne judges. By Dom. Stat. 50 & 51 Vict. c. 16, all original Exchequer Court jurisdiction is taken from the Supreme Court, and a judge of the Exchequer Court appointed. Appeals are allowed to the Supreme Court, within certain limitations.

(*b*) Can. Stat., 51 Vict. c. 43. The report of the Canadian Minister of Justice on this Act (which has been allowed), contains a strong assertion of the right of the Canadian Parliament to pass any Act affecting the Royal prerogative, since that body has under the B.N.A. Act, full jurisdiction over the Criminal Law, the

in 1888, which enacts that "notwithstanding any royal prerogative" no appeal shall be brought in any criminal case from any judgment or order of any Court of Canada, to any Court of Appeal or authority by which, in the United Kingdom, appeals to Her Majesty in Council may be heard.

Whilst there exists in the Crown of England a general power of disallowing any Act passed by the Parliament of the Dominion, the Imperial Government has given to the Governor-General in Council the right to review all the Acts passed by the several provincial legislatures, and to disallow, or, in other words, veto them for good and sufficient reasons.(*a*) That is to say, the Dominion Government now occupies towards the provincial legislatures the same relation which the Imperial Government formerly held towards the provinces before they became parts of the Federation. The exercise of this power has given rise to some controversies between the Dominion and the Provinces on account of the general government having considered it expedient in the public interests to disallow acts which were believed to be within the constitutional jurisdiction of the legislatures that passed them. The British North America Act does not limit the exercise of the power; the Dominion Government may disallow not only an Act which is unconstitutional in whole or in part, but also one that is quite within the competency of the legislature, but is at the same time regarded as injurious on grounds of public policy. Consequently a power, essentially sovereign in its nature, is to be used with great

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constitution of a general Court of Appeal for Canada, and the peace, order, and good government of the Dominion. In another case, still under the review of the Imperial Government—the Canadian Copyright Act of 1889, which conflicts with imperial legislation on the same subject—the Canadian Government takes the ground that the Canadian Parliament can legislate on all subjects over which it has legislative jurisdiction by section 91, even if in doing so it repeals an imperial statute, applicable to the Dominion, passed previous to 1867, when the Imperial Parliament gave such large powers to Canada. This legislation is subject, of course, to the general power of disallowance possessed by the Crown. See Canadian Sess. Pap. for 1889 and 1890, Criminal Law and Copyright, Bourinot's "Federal Government," p. 39, *note*.

(*a*) B.N.A. Act, 1867, §§ 56, 90.

caution. The exercise of the veto may have its uses in restraining hasty and unconstitutional legislation, or in cases involving the peace, integrity, and security of the Confederation, on which there is consensus of opinion to support the Central Government. The principle, however, appears now generally laid down by the leading statesmen and lawyers of both political parties in Canada, that the wisest policy is not to interfere with any legislation which is clearly within the constitutional rights of the provinces, and does not affect the harmony and vital interests of the confederation as a whole. As a rule the safest practice is to leave the Courts to act as the arbiter in all cases of constitutional controversy. The exercise of such power by a political body has obviously its dangers in a Federation composed of several provinces, jealous of their constitutional rights, anxious to preserve their local autonomy, and looking with distrust on every attempt to interfere with their legislative authority.(*a*)

The experience of Canada since 1867 proves quite conclusively that there is in the Dominion, as necessarily in all countries united by the federal principle, a tendency to friction between the National and the Provincial Governments arising out of the distribution of powers. The doctrine of State sovereignty is at times pressed to undue limits in Canada, as was the case for the greater part of a century in the United States. Happily for the Canadian Federation, there is no great social institution like slavery to complicate the political situation and give a fictitious strength for a while to the advocates of State rights. The presence of a large community speaking the French language, and possessing institutions differing in essential respects from those of the majority of the people of Canada, is one of the strong reasons for the constant assertion of provincial rights, apart altogether from the fact that such an assertion must always more or less exist in any system of federal government. Mr. Dicey(*b*) has stated with much force that the sentiment

(*a*) Bourinot's "Federal Government in Canada," pp. 58-62.
(*b*) "The Law of the Constitution," 3rd ed., p. 133.

"which animates a federal state is the prevalence throughout the citizens of more or less allied countries of two feelings, which are to a certain extent inconsistent—the desire for national unity and the determination to maintain the independence of each man's separate state." This is as true of Canada at the present time as it was of the United States before the war of rebellion, the result of which has been to strengthen the Central Government, and to make the doctrine of State sovereignty practically a dead issue. Notwithstanding the great care taken by the draftsmen of the Canadian constitution to draw the lines of division rigidly between the respective authorities of the Dominion, cases of conflict are inevitable. The danger in such a system lies in the indiscretions of politicians, in the provinces especially; its safety lies in the legal foundation of the constitution, and in that respect for law which exists in communities governed by the principles of English jurisprudence, and working out their future on the basis of British government. The perpetuation of the Canadian constitution and the harmony of the members of the Confederation rest in a large measure on the Judiciary of Canada, just as the constitution of the United States owes much of its strength to the legal acumen and sagacity of a great constitutional lawyer like Chief Justice Marshall, and of the able men who have, as a rule, composed the Federal Judiciary. The instinct of self-preservation and the necessity of national union must in critical times prevail over purely sectional considerations, even under a federal system, as the experience of the United States has conclusively shown us; but, as a general principle, the success of confederation must rest on a spirit of compromise, and in the readiness of the people to accept the decisions of the Courts as final and conclusive on every constitutional issue of importance.

JNO. GEO. BOURINOT.